

122 FERC ¶ 61,045
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Acushnet Company	Docket Nos. ER07-546-004 QF08-61-000
Connecticut Municipal Electric Energy Cooperative	ER07-546-005
University of Rhode Island	ER07-546-006
Commonwealth of Massachusetts	ER07-546-007
Commonwealth of Massachusetts	ER07-546-008
UTC Power	ER07-546-009

ORDER GRANTING WAIVER

(Issued January 18, 2008)

1. ISO New England Inc. (ISO-NE) is currently preparing to conduct its first Forward Capacity Auction (FCA). As part of that preparation, ISO-NE requires each resource seeking to participate in the auction to make payments to ISO-NE to cover the costs of evaluating the resource's fitness for participation. Several parties have asked for a waiver of ISO-NE's market rules regarding the timing of those payments. The Commission hereby grants the waiver.

I. Background

A. The February 4 Forward Capacity Auction

2. On March 6, 2006, ISO-NE filed a Settlement Agreement establishing the framework for New England's Forward Capacity Market (FCM).¹ On February 15,

¹ See generally *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (FCM Settlement Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006) (FCM Rehearing Order).

2007, ISO-NE filed revisions to its market rules to implement the FCM. The Commission accepted a portion of the market rules on April 16, 2007,² and the remainder on June 5, 2007.³ In its June 5 Order, the Commission accepted market rules that outline the rights and obligations of capacity resources.

3. Under the FCM mechanism, ISO-NE will provide capacity payments to resources that provide capacity to the New England region. Capacity resources compete to be selected to provide capacity, and receive payments, through an auction to be held every three years. The first FCA is scheduled for February 4, 2008.

4. Under the FCM market rules, ISO-NE has required resources wishing to participate in the FCA to provide ISO-NE with certain information, through a Show of Interest form that each resource must submit, that enables ISO-NE to determine whether that capacity resource is qualified to participate in the auction.

5. The FCM market rules also provide that a capacity resource must compensate ISO-NE for the expenses of determining whether that resource qualifies for participation in the auction. Section III.13.1.9.3 of the FCM market rules states that a party seeking qualification must deposit funds with ISO-NE to ensure that ISO-NE is compensated for performing the qualification study:

For each [Show of Interest form] submitted for the purposes of qualifying for either a Forward Capacity Auction or reconfiguration auction, the Project Sponsor must submit to the ISO a refundable deposit . . . (“Qualification Process Cost Reimbursement Deposit”). . . . Such deposit shall be used for costs incurred by the ISO and its consultants . . . associated with the qualification process described in section III.13.1.

6. Section III.13.1.9.3 further requires ISO-NE to provide capacity resources with an itemized statement of the costs of qualifying the resource, on an annual basis:

Annually, the ISO shall provide the Project Sponsor with an itemized statement in writing of the costs incurred by the ISO and its consultants, including the documented and reasonably-incurred costs of the affected Transmission Owner(s), associated with the qualification process and critical path schedule monitoring for each resource.

² *ISO New England Inc.* 119 FERC ¶ 61,045 (April 16 Order), *order on reh'g*, 120 FERC ¶ 61,087 (2007).

³ *ISO New England Inc.*, 119 FERC ¶ 61,239 (2007) (June 5 Order), *reh'g pending*.

Section III.13.1.9.3 then requires (emphasis added):

Coincident with the issuance of the annual statement, for [certain] projects . . . , the ISO will issue an invoice in the amount of the initial Qualification Process Cost Reimbursement Deposit paid by the Project Sponsor, or in the amount of the costs . . . that have been incurred by the ISO and its consultants to date, whichever is greater. *Payment on the invoice must be received by the ISO no later than 10 business days after the issuance date of the invoice.*

The rules further provide that if the project Sponsor fails to pay the amount due by the stated due date, ISO-NE will consider the project withdrawn, and "[s]uch a withdrawal shall be irrevocable, and payment on the invoice after the due date will not remedy the failure to pay for the withdrawal."⁴

B. Waiver Requests

7. The four above-captioned entities,⁵ each of which is the sponsor of a capacity resource that qualified for participation in the February 4 FCA, filed requests for a waiver of the provision of section III.13.1.9.3 that states that, if a capacity resource does not make payment on the invoice to ISO-NE within 10 business days of the issuance of the invoice, ISO-NE will consider the project to be withdrawn from consideration for the auction, as follows.

- Acushnet states that it did not make payment on ISO-NE's invoice within the ten-day period because the invoice was sent to the individual listed on its Show of Interest form as the "Credit/Financial Contact," rather than the technical contact who has responsibility for authorizing payment. Acushnet states that it has transferred the funds owed on the invoice to ISO-NE, and provides information to ensure that future payments will be handled within the ten-day time frame.

⁴ Section III.13.1.9.3.

⁵ Acushnet Company (Acushnet), Connecticut Municipal Electric Energy Cooperative (CMEEC), University of Rhode Island (URI), Commonwealth of Massachusetts (Massachusetts) and UTC Power. Massachusetts filed two separate requests for waiver (Docket Nos. ER07-546-007 and ER07-546-008), relating to two separate capacity resources.

- CMEEC states that it received an invoice from ISO-NE that was due on December 7, 2007,⁶ but that, due to an administrative oversight, CMEEC failed to make payment until December 13, 2007. CMEEC asks the Commission to waive the deadline, so as to permit its December 13 payment to be considered timely made.
- URI states that it unintentionally missed the December 7 deadline to pay ISO-NE's invoice, because it failed to hand-carry the invoice through its financial system, as it would normally do with bills due in less than thirty days. It states that it is eager to participate in the FCA as a demand resource and has invested significant time and effort in doing so, and asks the Commission to waive the deadline of section III.13.1.9.3 to enable it to do so.
- Massachusetts asks for a waiver with regard to payments on two separate invoices that it failed to make to ISO-NE in timely fashion. With regard to the first invoice (Docket No. ER07-546-007), Massachusetts states that it was unable to make timely payment because it had to seek clarification from ISO-NE as to the extent of its obligation. With regard to the second invoice (Docket No. ER07-546-007), Massachusetts states that it asks the Commission for an extension of time to make the payment, so as to enable state facilities to have a role in assisting ISO-NE with planning for future provision of energy resources. Massachusetts also states that it is currently taking steps to enable it to make future payments to ISO-NE via electronic funds transfer, which it believes will ensure that future payments will be made in timely fashion.
- UTC Power states that it inadvertently failed to make timely payment to ISO-NE because the invoice and statement were sent to an employee who was no longer employed by the company, which caused a delay of several days before the invoice was routed to the appropriate person, and because UTC Power also had to obtain clarification from ISO-NE as to the amount owed.

C. Comments and Protests

8. Notice of these five requests for waiver was published in the *Federal Register*, with answers, motions to intervene and comments due on or before January 11, 2008.⁷

⁶ Not all of the requesters specify the time frames involved in their requests for waiver. It would appear, however, that all of the invoices involved here should have been paid to ISO-NE on or before December 7, 2007.

⁷ 73 Fed. Reg. 2479 (2008).

On January 7, 2008, ISO-NE filed a motion to intervene, request for expedited consideration, and comments.

9. ISO-NE states that it takes no position as to whether the Commission should grant or deny the waiver requests, but notes that all of the invoices in question have now been paid.⁸ It further states that these waiver requests all pertain to the first FCA, and it is aware that a small number of resources have also missed the deadline for the second FCA, so it anticipates that requests for waiver of the deadline for the second FCA will also be filed with the Commission. ISO-NE states that it would similarly take no position with regard to the granting of waivers for the second FCA.

10. ISO-NE states, however, that it would oppose any future requests for waivers. It notes that it has informed participants of the deadlines of the FCM, and that it will be providing notice to all participants that in the future, it will not remain neutral on waiver requests. ISO-NE asks that any order granting the waiver requests explicitly provide that the waiver is limited to the specific and unique facts presented here.

11. Finally, ISO-NE states that, if the Commission grants the waiver requests, ISO-NE will need notification of that waiver fifteen days in advance of the auction, in order to enable it to allow the requesters to participate in the FCA scheduled for February 4, 2008. ISO-NE therefore asks for action on or before January 18, 2008.⁹

II. Discussion

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), ISO-NE's timely, unopposed motion to intervene makes it a party to all of the dockets in this proceeding.

13. The Commission will grant the waiver requests of the Parties and allow each to participate in the first FCA.

14. We note, however, that the waivers granted here are of limited scope and will not apply to future FCAs. The Commission has allowed multiple waiver requests to this point for parties that failed to follow proper procedures for participation in the first FCA. As we have found in the past, this is the first time that the FCM rules are governing the

⁸ ISO-NE states, with regard to Acushnet, that it understands that Acushnet is currently in the process of paying its overdue invoice.

⁹ ISO-NE also seeks intervention in Docket No. QF08-61-000, on the basis that Acushnet's waiver request was docketed in both that docket and Docket No. ER07-546-004.

behavior of New England market participants, and the voluminous and sometimes complex nature of those rules inevitably will lead to some confusion or misinterpretation of their directives. The Commission has granted relief in situations where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem must be remedied; and (4) the waiver does not have undesirable consequences, such as harming third parties.¹⁰

15. The Commission finds that the requests for limited waiver here satisfy the aforementioned conditions. The waiver requesters have stated that their failure to comply with the deadline was inadvertent. These waivers will relate solely to the deadlines for the FCA to be conducted on February 4, 2008. The waiver addresses a concrete problem (namely, the failure of the requesters to make timely payment on ISO-NE's invoices). As to the question of whether the waiver could have undesirable consequences, we conclude that no third parties will be harmed by granting these limited waivers of the New England market rules. Moreover, the Commission does not anticipate that granting these waivers will adversely affect ISO-NE's preparation for the FCA for the 2010-2011 Capacity Commitment Period, as evidenced by ISO-NE's comments.

16. Due to the specific and unique facts presented above, the Commission will grant the Parties' requests for limited waiver of the ISO-NE market rules for the 2010-2011 Capacity Commitment Period, consistent with ISO-NE's proposal in its comments. We emphasize the importance of enforcing the FCM rules in order to effectively administer the markets in New England. However, we recognize, along with ISO-NE, that the FCA is a new process for all parties involved, and participants are still becoming familiar with the lengthy and complex rules. Furthermore, given that ISO-NE does not expect the requested treatments to have an effect on the FCA, the Commission finds that granting of the requested waivers is appropriate.

¹⁰ See, e.g., *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007); *University of New Hampshire*, 121 FERC ¶ 61,185 (2007); *Waterbury Generation LLC, et al.*, 120 FERC ¶ 61,007 (2007).

The Commission orders:

The requests for waiver are hereby granted, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.